IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6646 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ELVINA ISUDAS CHRISTIAN

Versus

M.K. RAITHATTHA

Appearance:

MR RC JANI for Petitioner

M/S PATEL ADVOCATES for Respondent No. 1, 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 03/03/2000

ORAL JUDGEMENT

Learned advocate Mr. H.S.Mulia is appearing for Mr.R.C.Jani, learned advocate appearing for the petitioner. Ms. Siddhiben Talati, learned AGP is appearing for the respondent authorities. The facts of

the present petition, in short, are that the petitioner was appointed as a staff nurse on8.3.80 and since then, the petitioner has been discharging her duties as such in the Medical Branch of Civil Hospital. Thus, the petitioner is directly in services of the State Government. The petitioner was transferred by order dated 22nd September, 1988 on deputation from Medical Department to the Health Department, in the Primary Health Centre concerned in village Sander of Mehsana District According to the petitioner, such transfer is virtually a transfer out of the Government service as the Primary Health Centres are not maintained by the Government and are maintained by the District Panchayat and the staff of the Primary Health Centres is controlled by the District Development Officer and/or the District Health Officer and is transferrable to another primary health centre by such an officer. If the order of transfer is implemented, then the petitioner will be permanently under the Panchayat Service and her services would become transferrable from one village to another village. In para 3 of the petition, the petitioner has made averments about the mala fide of respondent NO.2 in passing the order of transfer. Thereafter, by moving the amendment, the petitioner has amended the petition and in paragraph 3A of the petition, the petitioner has raised the contention that the transfer on deputation to another department from Medical Branch to the Health Department can be made only with the consent of the petitioner as laid down by this Court in the case of Bhagwatiprasad Gordhandas Bhatt versus State of Gujarat, reported in 18 GLR pg. 562. Therefore, in paragraph 9A, the petitioner has prayed to issue a writ of mandamus or any other appropriate writ, order or direction to quash the order annexure "A" dated 22nd September, 1988 and has also prayed for interim relief against the implementation and execution of the said order dated 22nd September, 1988 during the pendency of this petition.

This Court, while admitting this petition by issuing rule thereon, has granted the interim relief in terms of para 9(B) of the petition. It was, however clarified by this Court that it will be open to the respondent authorities to transfer the petitioner in the same cadre if it becomes necessary for any valid administrative reasons. While granting interim relief, this Court has also considered the judgment of this court in case of Bhagwatiprasad (supra). This interim order passed by this court while admitting this petition is in force till this date and the same has not been challenged by the respondents before any higher forum. The respondents have also not filed any affidavit in reply to

the present petition controverting the averments made by the petitioner in the petition.

It is prima facie clear that the petitioner has been transferred on deputation from Medical Department to the Health Department and as such, same is illegal. The respondent has not pointed out that such transfer has been made with the consent of the petitioner. The word 'deputation' has been mentioned in the impugned order of transfer dated 22nd September, 1988. In the decision of this Court in case of Bhagwatiprasad (supra), it has been observed that the word "deputation" connotes service out side the cadre or out side the parent department in which the petitioner is serving. With consent, the employee can be deputed to any department or any cadre or at any other place of service. The transfer is always limited to equivalent post in the same cadre and in the same department. The deputation and transfer both are basically different from each other in a way that the transfer can be only to equivalent post in the same cadre but the deputation may be to any other department where even the equivalence may not have been determined. The transfer is a right of the master and it is an incident of service and can only be challenged on the ground of mala fide and/or violation of the statutory rules relating to transfer. The deputation can be made only with the consent of the employee because the employe joined the department to render service in that department and he cannot be made to serve somewhere else, may be in a post much lower to his post. If such power is to be conceded, the contract of service may be degenerated into a contract of slavery because the slaves can be employed in any manner and in any work human or inhuman as the master or the owner of the slave desires. Such is not the position of the employees of the State. Therefore, on principles and authority, it appears clear that a person belonging to a cadre cannot be deputed or transferred out side the parent department and out side the cadre. He may be sent on deputation but that too with his consent. The deputation cannot be made without consent of the person to be deputed.

Similarly, in case of Jawaharlal Nehru University versus Dr. KS Jawatkar and others reported in AIR 1989 SC 1577 which was a case of transfer from one university to the other university, it has been held by the apex court in the said decision that no employee can be transferred without his consent from one employer to another employer, The consent may be express or implied. It has been held that there is also no doubt that the employment of the employee could not be transferred by

the appellant from appellant university to the Manipur University without his consent. The contract of service entered into by the respondent was a contract with the appellant University and no law can convert that contract into a contract between the respondent and the Manipur University without simultaneously making it expressly or by necessary implication subject to the consent of the employee. The position in law is clear that no employee can be transferred without his consent from one employer to another.

The Division Bench of Sikkim High Court, in case of M.K.Pradhan versus State of Sikkim, reported in 1996 Lab.IC pg. 270 held that a person cannot be sent on deputation to the other department without his consent and and usually some incentives are given to obtain his consent. The Division Bench of Sikkim High Court has considered the decision of this Court reported in 18 GLR pg. 562 in case of Bhagwatiprasad and has considered para 15 of the said decision as under:

> "15. Today, when the specialization is the order of the day, when specific educational academic and experience qualifications are prescribed for various posts and aptitude for certain type of work is taken into consideration a man may apply for a post looking forward, if he is appointed, to efficiently discharge the duties assigned to that post. A practising lawyer may be willing to be appointed as a Judge. Now, once he becomes a Judge upto the level of District Judge, he is a State servant. Can the State say that he should be asked to work as Prosecutor without his consent on the only assurance that his lien is retained and his pay is protected ? Man applied for the post of a Judge because he had the aptitude for discharging duties of a Judge.He may turn out to be a good Judge but not be a good lawyer. Could he be asked against his wish to do something for which he never applied. He looked forward to be in the cadre and move up vertically. He took into consideration the duties assigned to the post for which he opted and accepted the employment. Could he be subsequently said no, because you are a government employee Rule 17 of the Bombay Civil Services Rules permits State Government to employ you in any manner as Government thinks proper ?"

Mr. Mulia, learned advocate appearing for the

petitioner has relied upon the recent decision of the apex court in case of Umapati Chaudhary versus State of Bihar and another reported in (1999) 4 Supreme Court cases 659 which is relating to the question of deputation and repatriation of deputationist after his permanent absorption. In the said decision, it has been held as under:

> "Deputation can be aptly described as an assignment of an employee commonly referred to as the deputationist) of the department or cadre or even an organization (commonly referred to as the parent department or lending authority) to another department or cadre or organization (commonly referred to as the borrowing authority). The necessity for sending on deputation arises in public interest to meet the exigencies of public service. The concept of deputation is consensual and involves a voluntary decision of the employer to lend the services of his employee and a corresponding acceptance of such services by the borrowing employer. It also involves the consent of the employee togo on deputation. In the case at hand all the three conditions were fulfilled. The university, the parent department or lending authority, the Board the borrowing authority and the appellant, the deputationist, had given their consent for deputation of the appellant and for his permanent absorption in the establishment of the borrowing authority. There is no material to show that the deputation of the appellant was not in public interest or that it was vitiated by favouritism or mala fide. The appellant stood permanently absorbed in the Board. He could not be repatriated thereafter. "

In view of the above decision, in case of transfer on deputation, consent of the employee would be required. IN the present case, the respondents have not filed any affidavit in reply and have not pointed out that before transferring the petitioner from the medical branch to the health department on deputation, consent of the petitioner was obtained or not. In absence of such consent, and also in view of the decision of this court in the case of Bhagwatiprasad (supra), this petition is required to be allowed. Same is accordingly allowed. Impugned order dated 22nd September, 1988 annexure "A" to the petition is quashed and set aside. Rule is made

absolute accordingly with no order as to costs.

3.3.2000. (H.K.Rathod,J.)

Vyas